

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN LEE KEITH,

Defendant-Appellant.

UNPUBLISHED

June 10, 2014

No. 315169

Oakland Circuit Court

LC No. 2012-239831-FH

Before: WILDER, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM.

Defendant pleaded guilty of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under the age of 13), for which he was sentenced as a second habitual offender, MCL 769.10, to a prison term of 7 to 22-1/2 years. He appeals by delayed leave granted, challenging the trial court's 25-point score for offense variable (OV) 11 of the sentencing guidelines. We affirm.

As our Supreme Court recently explained in *People v Rhodes*, 495 Mich 938; 843 NW2d 214 (2014):

Determining whether a trial court properly scored sentencing variables is a two-step process. First, the trial court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. The clear error standard asks whether the appellate court is left with a definite and firm conviction that a mistake has been made. Second, the appellate court considers de novo 'whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute.'" [Citations omitted.]

OV 11 takes into account "criminal sexual penetration." MCL 777.41(1). If the defendant is convicted of first- or third-degree CSC, the court cannot count "the 1 penetration that forms the basis of" that conviction. MCL 777.41(2)(c). However, the court can count any other "sexual penetrations of the victim by the offender arising out of the sentencing offense." MCL 777.41(2)(a). OV 11 was scored at 25 points, indicating that one criminal sexual penetration occurred that arose out of the sentencing offense. MCL 777.41(1)(b) and (2)(a). At sentencing, defendant denied that he penetrated the victim.

“A sentencing court may consider all record evidence before it when calculating the guidelines,” including information in a presentence investigation report. *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993). A presentence report is presumed accurate and may be relied on by the trial court unless effectively challenged by the defendant. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997); *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). “The sentencing court must respond to challenges to the accuracy of information in a presentence report; however, the court has wide latitude in responding to these challenges.” *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). In responding to the challenge, the court “may determine the accuracy of the information, accept the defendant’s version, or simply disregard the challenged information.” *Id.* If the court elects to determine the accuracy of the information, the prosecutor “must prove by a preponderance of the evidence that the facts are as asserted.” *Ratkov*, 201 Mich App at 125.

Defendant did not dispute the accuracy of the information in the presentence report and the supplemental report. Those reports indicated that the victim’s mother found defendant engaging in conduct with the victim that was highly suggestive of anal intercourse. The victim told her mother, “Daddy put his thing in my butt,” but the mother could not discern from what she observed whether penetration actually occurred. The victim underwent a sexual assault examination that same day and was found to have “a dilation of her rectum approximately 1 cm with a rectal tear at 5 o’clock.” The parties agreed that seminal fluid was recovered from the victim’s rectal swab, although the fluid contained insufficient DNA to match it to defendant. Given such information, the trial court did not clearly err in finding by a preponderance of the evidence that penetration occurred. Because that penetration arose out of, but was not itself, the sentencing offense, OV 11 was properly scored at 25 points.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Kirsten Frank Kelly